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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. [redacted] 7

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

NO. 534

LOUIS JOSEPH ABBATE and
MICHAEL LOUIS FALCONE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for Petitioners

Petitioners, Louis Joseph Abbate and Michael Louis Falcone, were convicted in the United States District Court for the Southern District of Mississippi, Jackson Division, of the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code. The United States Court of Appeals for the Fifth Circuit affirmed their convictions. The petitioners brought their petition in this Court for a writ of certiorari claiming a violation of their right not to be twice placed in jeopardy for the same offense under the Fifth Amendment to the Constitution of the United States;

in that they were tried, convicted and sentenced in the courts of the United States for the same act for which they had been previously indicted, pled guilty to and sentenced in the courts of the State of Illinois. This Court granted certiorari. The petitioners pray that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

OPINION BELOW.

The opinion of the United States Court of Appeals is reported in 247 F. 2d 410.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on August 8, 1957, and a petition for rehearing was denied on September 9, 1957. The petition for a writ of certiorari was filed on October 8, 1957, and this Court granted the petition on December 16, 1957. The jurisdiction of this Court is invoked under Title 28 United States Code Section 1254(1).

QUESTION PRESENTED.

Whether the petitioners were twice placed in jeopardy in violation of the Fifth Amendment to the Constitution of the United States, where the evidence shows that they had been previously convicted in the Courts of the State of Illinois of the crime of conspiracy to destroy the property of the Southern Bell Telephone Company, upon the same facts as were presented in the Courts of the United States, and upon which they were convicted of conspiracy to destroy a communications line operated or controlled by the United States.

STATUTES INVOLVED

Constitution of the United States, Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

Title 18 U. S. C. §371.

"Conspiracy to commit offense or to defraud United States:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Title 18 U. S. C. §1362:

"Communication lines, stations or systems.

"Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or malicious-

ly interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both."

Illinois Revised Statutes (1957) Chapter 38 Section 139 [Conspiracy]:

"If any two or more persons conspire or agree together, * * * with the fraudulent or malicious intent wrongfully and wickedly to injure * * * property of another, or to commit any felony, they shall be deemed guilty of a conspiracy; * * * and every person convicted of conspiracy at common law, shall be fined not exceeding $2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary."

STATEMENT.*

The petitioners, Louis Joseph Abbate and Michael Louis Falcone, residents of Chicago, Illinois, were indicted by the Grand Jury of the Southern District of Mississippi, for the crime of conspiracy to violate Section 1362 of Title 18 of the United States Code, which provides a penalty for the destruction of a means of communication operated or controlled by the United States. (R. 2) They were jointly indicted with James Shelby, a resident of Silver Springs, Maryland, and Charles Perry, a resident of Jackson, Mississippi. (R. 39) All four defendants were found guilty by a jury and were sentenced to the custody of the Attorney General; Abbate for three years, Falcone for one year, Shelby for three years, and Perry for two years. (R. 34, 7r. 1124-1133) On appeal the United States Court of Appeals reversed the convictions of Shelby and Perry because of an inadequate cautionary instruction on the limitation of statements introduced against Abbate and Falcone, and remanded their cases for a new trial. The convictions of Abbate and Falcone were affirmed. (R. 43)

The indictment arose out of a strike of the Communications Workers of America against the Southern Bell Telephone Company. Shelby was an official of the international union and Perry was the president of the local union in Mississippi. A fifth alleged conspirator, Norman Douglas McLeod, who was not indicted, was the chief witness for the Government. (R. 38, 39)

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* The letter "R" refers to the printed record. The letters "Tr" refer to the transcript of the record filed in this case. Some matters from the transcript are set forth in the statement in order to give the Court a more adequate picture of the case as a whole, than may be derived from the printed record. These matters are not, however, necessary for the limited question before the Court, and, therefore they were not printed.

McLeod testified that an attorney for the Southern Bell Telephone Company came to see him at the Oklahoma State Penitentiary and asked him to become a witness against the defendant. He had been questioned several times previously by agents of the FBI and had denied that he was involved in the case and had refused to become a Government witness. The attorney told him that if he would help the telephone company by testifying for the Government, he would not be indicted. (R. 39, Tr. 170-180)

Abbate, Falcone and McLeod were solicited, in Chicago, by Shelby to dynamite certain property of the Southern Bell Telephone Company, located in the State of Mississippi. (R. 21-23) The four men met in Chicago, where Shelby gave them plans of the various installations to be destroyed and instructions as to how to do it. (R. 23) After Shelby left the City of Chicago, Abbate and Falcone informed McLeod that they were withdrawing from the scheme and that they were going to inform the telephone company in Chicago, which they did. (Tr. 54, 55)

The telephone company officials called the matter to the attention of the Chicago Police Department and thereupon the petitioners were arrested and brought to the office of the State's Attorney of Cook County, Illinois. (Tr. 244, 258, R. 16) Abbate and Falcone gave extensive information to the telephone company authorities and to the State's Attorney's office. It was because of this that the plan was brought to light and the prosecutions were instituted.

Abbate and Falcone were prosecuted in the Criminal Court of Cook County, Illinois, for conspiracy to destroy property of the Southern Bell Telephone Company, and they pleaded guilty and received sentences of not exceeding three months. (R, 5-15, 32, 33, 39) Afterwards, indictments were returned in Mississippi charging the Federal offense.

ARGUMENT.

The problem of double jeopardy has been before this Court recently in several cases; *Hoag* v. *New Jersey*, No. 40 this term; *Ladner* v. *United States*, No. 41 this term; *Ciucci* v. *Illinois*, No. 157 this term; and *Bartkus* v. *Illinois*, No. 39 this term. The *Bartkus* case which is closest to our problem was ably presented by Mr. Walter Fisher of Chicago, and we have used some of the same material. However, we have tried to avoid repetition of his exhaustive analysis of the material. The problem before this Court in the present case is whether a person may be tried, convicted and sentenced in the Federal Courts for the same conduct for which he had been previously convicted and sentenced in a state court.

A. Application of the concepts of double jeopardy to successive prosecutions by different nations.

The concept of double jeopardy in the Common Law was first applied in the English courts to prosecutions by different nations over a century before the American Revolution. The first case in which the subject arose, *The King* v. *Thomas*, 1 Sid 179, 82 Eng. Rep. 1043; 1 Lev. 118, 83 Eng. Rep. 326; 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662), concerned a prosecution for murder under a 1534 statute, 26 Hen. 8,c. 6, sec. 6, 4 Stat. at Lg. 328 (1534), which provided that the neighboring English county had jurisdiction over felonies committed in Wales. The defendant who had been acquitted by the Welsh tribunal contended that by 27 Hen. 8 "Wales are to have the same immunities as English born, who on acquittal cannot be tried again." The case was referred to the King's Bench by the assize court and it was resolved that the defendant should be discharged since "*autrefois acquit in les Marches de Gales est bone plea icy in Angleterre*". (Reporters' headnote 1 Sid. 179.)

The next and the leading case, *The King* v. *Hutchinson*, was unreported except for references to it in the reports of other cases. See *The King* v. *Roche*, 1 Leach 134, 135 n. a, 168 Eng. Rep. 169 (K.B. 1775) and *Beak* v. *Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1688).

The facts as they come to us from the reports of other cases indicate that Hutchinson killed a man by the name of Colson in Portugal and was acquitted there of the Portugese equivalent of murder. Upon his return to England he was apprehended and committed to Newgate. (3 Keb. 785, 84 Eng. Rep. (K.B. 1678) reports the denial of bail.) He was brought before the King's Bench by Habeas Corpus and produced an exemplification of the record of acquittal in Portgual. The cause was referred to the consideration of the Judges who all agreed that, having been acquitted of the charge under the Portugese law, he could not be tried again for it in England.

In *Roche's* case, 1 Leach 134, 168 Eng. Rep. 169 (K.B. 1775), the facts are similar to those of *Hutchinson's* case. Roche was indicted for the murder of one Ferguson at the Cape of Good Hope. He pleaded *autrefois acquit* before Olaff Martini Bergh, provincial Fiscal of the Dutch Supreme Court of Criminal Jurisprudence there, and he also pleaded not guilty. The prosecutor requested that the jury be charged upon both issues but the court refused saying that doing so "would lead to this absurdity, that being charged with both, they would be obliged to find upon both; and yet if the first finding was for the prisoner, they could not go to the second because that finding would be a bar." *The King* v. *Roche*, 1 Leach 134, 135.

In addition to these English precedents we find that on the continent the Roman maxim of *non bis in idem* was applied to a second prosecution and that the first court acquiring jurisdiction held it exclusively and further pro-

secution in the Courts of nations having concurrent jurisdiction was barred. Pradier—Fode're', Droit International Public, Europe'en et Americain, (1887) tom III, 1073-1074 De Martens, Traite' de Droit International (3d Ed. 1887) tom III, 119.

It is true that the cases cited above concern themselves with the plea of *autrefois acquit,* however, the same rulings should logically apply to the plea of *autrefois convict.* The lack of cases wherein the plea of *autrefois convict* was raised may be assumed to have arisen from the fact that at that period in history the penalty for most if not all felonies was hanging, the execution of which sentence effectively barred any further prosecutions. There is no reason to doubt that had the case arisen where the first conviction was had in a country other than England the point would be well pleaded in a prosecution in England.

B. Early American treatment of successive prosecutions by two nations or states.

There seems to be little doubt that at the time of the American revolution and the early days under the Constitution that a trial in a court of another nation or state would bar a prosecution in another nation or state.

In the Declaration of Independence one finds the complaint that the king had "combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended Legislation:

"For quartering large bodies of armed troops among us:

"For protecting them, by a mock trial, from punishment for any Murders which they should commit on the Inhabitants of these States:"

In *State* v. *Antonio*, 3 Brev. (S.C. Law) 562 (1816) we find this language:

> "As to the second objection, 'A man may be twice tried', this could not possibly happen: First, because it is the established *comitas gentium*, and it is not infrequently brought into practice to discharge one accused of a crime, who has been tried by a court of competent jurisdiction. If this prevails among nations who are strangers to each other, could it fail to be exercised with us who are so intimately bound by political ties."

This from the state which was the leader of the "State's Rights" group, and which would lead the secessionist states out of the Union.

The next case of consequence in the United States is *Houston* v. *Moore*, 5 Wheat. 1 (1820), there we find Mr. Justice Washington saying:

"To subject [a defendant] to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is to my apprehension, something very much like oppression, if not worse."

Mr. Justice Johnson in *United States* v. *The Pirates*, 5 Wheat. 184, 197, in reply to questions certified by the District Court, said that "there can be no doubt that the plea of *autrefois acquit* [by defendants charged with piracy] would be good, in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state . . ." He then went on to make the distinction between piracy and murder and stated that the plea of *autrefois acquit* would not be good in a murder prosecution in Great Britain. This however is not the case as we pointed out above.

In another early case, *State* v. *Randall*, 2 Aik. 89, 100, (Vt. 1827) we see in the opinion of the court:

> "[T]here is urged upon the court the hardship, and even absurdity, that a man should be liable to be arraigned before two distinct tribunals, for the same offense. The difficulty in this, like other concurrent jurisdictions, is rather imaginary than real. The court that first has jurisdiction, by commencement of the prosecution, will retain the same till a decision is made; and a decision in one court will bar any further prosecution for the same offense, in that of any other court."

In each of these cases the question of double jeopardy was not before the various courts except in argument of the defendants that they could not be tried the first time because they might be tried a second time for the same offense. The unsoundness of this argument is apparent and we have no quarrel with the reasoning of these courts, which overruled it. Nevertheless the cases are important for their treatment of the double jeopardy question.

While discussing the early American decisions on the question of successive prosecutions for the same offense, it is interesting to note that when the First Congress was drafting the Bill of Rights a proposal was introduced which would have amended the Fifth Amendment, causing it to bar only second prosecutions for "the same offense by any law of the United States." (1 Annals of Congress, col. 782 [reprint 753].) This proposal was not adopted.

Thus, even if one accepts the doctrine of *Barron* v. *Baltimore*, 7 Pet. 243, that the first eight amendments to the Constitution do not apply to the states, the fact that the proposal did not carry indicates that it was intended that the Federal government is bound by a state prosecution and cannot try the accused a second time for the same offense.

C. The doctrine of the Lanza case.

This court decided the question of successive prosecutions first by a state and then by the Federal Government in *United States* v. *Lanza*, 260 U.S. 377. Speaking for the Court, Mr. Chief Justice Taft stated:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all . . . the first eight amendments, applies only to proceedings by the Federal Government, *Barron* v. *Baltimore*, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority. Here the same act was an offense against the State of Washington, because a violation of its law, and also an offense against the United States under the National Prohibition Act. The defendants thus committed two different offenses by the same act, and a conviction by a court of Washington of the offense against that State is not a conviction of the different offense against the United States and is not double jeopardy."

This doctrine, stemming from what the Court stated was the concurrent jurisdiction of both the states and the Federal Government, was said to have been "supported by a long line of decisions by this Court." These cases are: *Fox* v. *Ohio*, 5 How. 410; *United States Marigold*, 9 How. 560; *Moore* v. *Illinois*, 14 How. 13; *United States* v. *Cruikshank*, 92 U.S. 542; *Ex Parte Siebold*, 100 U.S. 371; *Cross* v. *North Carolina*, 132 U.S. 131; *Pettibone* v. *United States*, 148 U.S. 197; *Crossley* v. *California*, 168 U.S. 640; *Southern Ry. Co.* v. *R.R. Commission of Indiana*, 236 U.S. 439; *Gilbert* v. *Minnesota*, 254 U.S. 325; and *McKelvey* v. *United States*, 260 U.S. 353. An analysis, however, shows that the decisions cited by the Court to sustain the theory that

a single act may be successively punished by the states and the Federal government does not bear out this contention. The cases deal only with the right of the states and the Federal government to enact legislation within the same area. They do not hold that the states or the Federal government may punish after the other has punished. Any language which these decisions might contain to this effect is only dicta.

A statement in the *Lanza* case which bears careful scrutiny is that which states that the effect of barring a Federal prosecution for the same offense as was prosecuted in the state courts, under State legislation which called for only nominal punishment, would cause "a race of offenders to the courts of that state to plead guilty and secure immunity from federal prosecution . . ." That this reasoning is not valid is apparent. If the Congress decides that the Federal interest is predominant, it may, by appropriate legislation pre-empt the field and thus bar any state prosecution. *Commonwealth* v. *Nelson*, 350 U. S. 497. This reasoning also assumes that the state law provides a lesser penalty. For the purposes of the present case this assumption is unwarranted. The statute of the State of Illinois under which the petitioners were prosecuted contains the same penalty as that provided by the Federal statute. (See pages 3 and 4 of this brief for the text of these statutes.)

The fear of "a race of offenders" to state courts further presupposes that the states are unequipped or cannot be relied upon to carry out the prosecutions; or that the nominal state penalties are inadequate. As for the first of these suppositions we wish to cite the following from the dissenting opinion in *Screws* v. *United States*, 325 U.S. at page 160:

> "We are told local authorities cannot be relied upon for courageous and prompt action, that often they have personal or political reasons for refusing to prosecute. If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility."

In answer to the assumption that the penalties provided by the states are inadequate, we can only say that there is no way of measuring the wisdom of the men who constitute the Congress of the United States and comparing it with that of the men who constitute the State legislatures.

We point to the following comparisons between the Federal Criminal Code and the Illinois Criminal Code for certain representative crimes:

UNITED STATES	ILLINOIS
Robbery of a bank while armed with a dangerous weapon. 18 U.S.C. 2113(d). 15 years.	Robbery while armed with a dangerous weapon. Ill. Rev. Stat. (1957) Ch. 38, sec. 501. 1 year to life.
Breaking or entering a railroad car with intent to commit larceny. 18 U.S.C. 2117. 10 years.	Breaking and entering a railroad car with intent to commit larceny. Ill. Rev. Stat. (1957) Ch. 38, sec. 84. 1 year to life.
Manslaughter, voluntary. 18 U.S.C. 1112. 10 years.	Manslaughter, voluntary. Ill. Rev. Stat. (1957) Ch. 38, sec. 362, 364. 1 year to 14 years.
Manslaughter, involuntary. 18 U.S.C. 1112. 3 years.	Manslaughter, involuntary. Ill. Rev. Stat. (1957) Ch. 38, sec. 363, 364. 1 year to 10 years.
Receiving goods etc. from an interstate shipment. 18 U.S.C. 2315. 10 years.	Receiving stolen property. Ill. Rev. Stat. (1957) Ch. 38, sec. 492. 1 year to 10 years.
Counterfeiting obligation of the United States. 18 U.S.C. 471. 15 years.	Counterfeiting public securities, bank bills, etc. Ill. Rev. Stat. (1957) Ch. 38, sec. 278. 1 year to 20 years.

The above list is not meant to be comprehensive nor do we wish to imply that all crimes are punished more severely in Illinois than by the United States. We do wish to show that many serious crimes are dealt with as severely or more severely by Illinois than by the United States. Several of the above crimes, such as counterfeit-

ing and robbery of a bank insured by the Federal Government, are crimes with which the United States is peculiarly concerned. Yet, if prosecuted by the State of Illinois, one may be sentenced to a much longer term in the state penitentiary. It is indeed the unusual case where the person committing a crime which may be punished by both the Federal Government and a state could receive an appreciably lower maximum sentence in a state court. The "race" to the state courts is a phenomenon which is not likely to occur.

We submit that the cases cited in the *Lanza* case do not support the decision of the Court, nor are the practical considerations advanced therein sound.

D. The Court under its supervisory power over the administration of justice may refuse to extend the "two sovereignties" theory to the area of double prosecutions.

It is abhorrent to our concept of justice that one person may be tried and convicted and punished for a certain course of conduct and then tried, convicted and punished a second time by a second government for the same course of conduct.

The question raised in this case is not new nor is the relief for which we are asking novel. The following states have enacted legislation prohibiting prosecution after conviction or acquittal in the courts of another state or foreign country: Arizona, California, Idaho, Indiana, Minnesota, Mississippi, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wisconsin. (See A. L. I., Model Penal Code, Tentative Draft No. 5, page 61.) The American Law Institute has proposed a similar provision in its tentative Model Penal Code. (A. L. I. Model Penal Code,

Tentative Draft No. 5, Section 1.11.) This provision is as follows:

> "When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:
>
> (1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.09 and the subsequent prosecution is based on:
>
> (a) the same conduct; or
>
> (b) the same series of acts or omissions, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other or the second offense was not consummated when the former prosecution was initiated; or
>
> (2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted."

The above draft is the result of long and careful research by eminent scholars interested in proper legislation in the field of criminal law. The fact that this is legislation and not court decision is not important for this discussion. It demonstrates that legislatures and prominent lawyers agree that a prosecution in one jurisdiction should bar a subsequent prosecution, for the same conduct, in another jurisdiction.

The Federal government may not prosecute a man twice for the same offense and most states by their constitutions prohibit the punishment of an individual twice for the same offense. It is repugnant to the concepts of justice of our civilization that a man be punished twice for the same offense. The federal theory of dual sovereignty in no way lessens this repugnance and under no accepted theory of the purposes of penal legislation is it removed.

One purpose of penal statutes is to prevent certain acts which are considered inimical to the interests of society or the sovereign. A second reason for the existence of penal statutes is the obtaining of retribution by punishment from those who have been guilty of this conduct. A third is the rehabilitation of the offender. Do any of these reasons for the existence of penal legislation require double prosecution and conviction?

If a certain course of conduct is not considered to be in the best interests of the society, it is not more prohibited if both the state and Federal governments enact the prohibiting legislation.

If one accepts the primitive theory of retributive punishment that each of the wronged are entitled to inflict that punishment and thus relieve the felt need for retribution occasioned by that wrong, then double punishments are called for. Our civilization has long since, in theory at least, discarded this purpose of penal legislation.

If one accepts a more sophisticated theory of punishment, that it is for the purpose of expiating the wrong by the doing of penance (hence the word penitentiary), must the wrongdoer make his penance twice? There is no need for this, and the problem might arise that the roles be-

come transposed, the person convicted might feel himself more wronged by the double punishment than he would feel that society has been wronged by his action. Then the original victim, society, is the oppressor and the wrongdoer becomes the victim of the oppression.

If one accepts the rehabilitation theory of criminal law, again it is seen that double convictions are not in keeping with this theory, unless one is willing to say that the second conviction will make the wrongdoer more rehabilitated than he was after the first conviction. Here again it may be said that the second conviction will not only not cause further rehabilitation, but will have just the opposite effect, by causing the person convicted to believe himself to have been wronged by society. Double punishment might also cause a large segment of society to believe that the infliction of the second punishment is too severe and therefore unjust.

N. S. Timasheff, writing for the Journal of the American Institute of Criminal Law and Criminology (Vol. 28, pages 396, 401) says this:

> ". . . If repression becomes obviously too severe as compared with that demanded by the socio-ethical evaluations punishment does not result in reinforcing the ethical group conviction, but, on the contrary, it produces collective sentiments which rather undermine it: offenders are considered 'victims' and governmental agents applying punishment tyrants." (Timasheff, N.S., *The Retributive Structure of Punishment*, 28 *Journal of the American Institute of Criminal Law and Criminology* 70)

Mr. Justice Clark (then the Attorney General) writing for the Iowa Law Review (Vol. 31, page 191) had this to say:

> "The record clearly demonstrates that severe punishment has contributed little as a deterrent to crime. Such punishment has failed to impress either the offender who underwent the punishment or the public, the ultimate sufferer. This suggests the familiar classical instance, extreme though it is, about Nineteenth Century England when the penalty for a pick-pocket was death by hanging. Reforms urged upon Parliament failed to take hold until it was discovered that the public had to be protected against having their pockets picked while witnessing the execution of the pick-pocket on the scaffold in the public square.
>
> "The principal that dominated criminal administration for centuries is described by the scholars as *lex talionis*: Man had sinned—he must pay with an equal amount of retributive punishment. It was measured in the amputation of hands, the splitting of ears, 'doing time' in dark, vermin-infested dungeons, in wall shackles, on the wheel and the rack, by public floggings and in solitary confinement.
>
> "Over the years, however, man's slow enlightenment gave to him a better understanding of the causes of human behavior and his humanitarianism came to challenge the old principles of retributive punishment. We now realize that harsh punishment does not protect society or prevent the offender from again engaging in crime." (Clark, Tom C., Forward: *A Symposium in Fitting the Punishment to the Criminal*, 31 *Iowa Law Review* 191)

The foregoing discussion is intended to show that the infliction of double punishments is not conducive to the proper administration of criminal justice. In fact it may, ultimately, do great harm to that administration.

While recognizing the existence of a dual sovereignty system, we believe that there are certain areas in which a rigorous application of the theory is contrary to the concepts of justice. One of these areas is double jeopardy. The Court, under its power to supervise the administration of criminal justice, may prohibit the Federal Courts from punishing one already punished by the state courts for the same offense.

In a recently decided case, this Court held, under its powers to supervise Federal law enforcement, that a Federal agent may be enjoined from testifying in a state court, where his testimony would be based upon an illegal search and seizure arising from abuse of process of a Federal Court, *i.e.* a search warrant issued by a United States Commissioner. *Rea* v. *United States,* 350 U.S. 214. (See also *McNabb* v. *United States,* 318 U.S. 332) We are not asking the Court to do more in the present case than it did in the *Rea* case. The *Rea* case resulted in this court's supervising law enforcement activities as such. In the present case we only ask the Court to supervise the District Courts.

The dual sovereignty theory should not be extended to areas in which its application causes a violation of basic concepts of justice. To so apply this theory leaves open the large area of concurrent jurisdiction in which defendants may not avail themselves of the basic right not to be tried twice for the same offense. This area promises to become even larger as Congress occupies new fields already occupied by the State.

We are asking the Court to do no more than to apply what has always been the common law rule as to successive prosecutions by different sovereignties for the same conduct. Under this doctrine, the sovereignty of the states would in no wise be impaired and the federal structure would remain as before.

E. The petitioners were twice placed in jeopardy by successive prosecutions for a single course of conduct.

What constitutes joepardy is a question which has long troubled the courts of the states and the Federal courts. "The possibility of splitting what appears to be a single criminal transaction into various component offenses, when combined with the prolific creation of new statutory offenses, tends to render the determination of identity of criminal offenses with respect to a plea of double jeopardy increasingly difficult." Successive Prosecutions Based on the Same Evidence as Double Jeopardy, 40 Yale Law Journal 462. The rule adhered to in the courts of the United States was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 when the Court said:

> ". . . The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not . . ."

In the present case the petitioners were indicted in Illinois for the crime of conspiracy and also in the Federal court for the crime of conspiracy. We have set forth these statutes on pages 3 and 4 of this brief. The Illinois statute provides that two or more persons who conspire or agree together with the fraudulent or malicious intent wrongfully and wickedly to injure the property of another, and every person convicted of conspiracy at common law shall be fined and imprisoned as provided for by the statute. Ill. Rev. Stat. (1957) Ch. 38, sec. 139. The Federal statute provides that if two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined and imprisoned as provided. In the present prose-

cution the offense against the United States was that defined by 18 U.S.C. 1362, the destroying or injuring a means of communication operated or controlled by the United States.

The prosecution in Illinois was for conspiracy to destroy the property of the Southern Bell Telephone Company. The evidence at the trial in the District Court of the United States showed that the property of the Southern Bell Telephone Company and the means of communication operated or controlled by the United States were essentially the same. The testimony of Mr. Frank Furlic [*sic*] the Assistant State's Attorney of Cook County, Illinois, (R. 15 *et seq.*) and the testimony of McLeod the chief witness for the government who testified that the attorney for the telephone company asked him to help the company by testifying for the government, (R. 39, Tr. 170-180) shows that the crime punished by the Illinois court was the same transaction as the crime punished by the United States Court.

We suggest that the American Law Institute's method of resolving this problem adequately and effectively covers the situation. (A.L.I. Model Penal Code, Tentative Draft No. 5, section 1.11. The A. L. I. test is that the prior acquittal or conviction be based on: "(a) the same conduct; or (b) the same series of acts or omissions, unless the offense of which the defendant was formerly convicted or acquitted and the offenses for which he is subsequently prosecuted each requires proof of a fact not required by the other or the second offense was not consummated when the former prosecution was initiated . . ."

This test is wholly applicable to the present case and provides protection against the peril of double trial as well as double punishment, the narrow issue of this cause. Following the A. L. I. test, which is really the *Blockburger*

test, laid down by this Court, modified to meet the situation not contemplated by *Blockburger*, the second prosecution in this case which charged the same conduct as in the first (Illinois) prosecution, constitutes a violation of petitioners' right not to be twice placed in jeopardy.

CONCLUSION.

For the above and foregoing reasons it is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

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